IN THE

Supreme Court of the United States

OCTOBER TERM 1941

JACOB NOVICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record filed herein. No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on December 17, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended, 28 U. S. C., Sec. 347.

Statement of the Case

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors to be Urged

The assigned errors to be urged are identical with the "Reasons for Allowance of Writ" set forth in the foregoing petition.

ARGUMENT

1. The fact that petitioner assisted others in obtaining sugar for use in the illicit distillation of alcohol, coupled with the further fact that he knew of their purpose, did not render him guilty of conspiracy.

Of course, the factual assumption herein is made only *arguendo*. In order that the foregoing situation should suffice to establish petitioner's guilt, the Government must also clearly prove that he had knowledge that the parties for whom he procured sugar were parties to a conspiracy. Even if he were the actual seller to codefendants of the sugar, he would not be guilty. It must be remembered that he is not charged with aiding or abetting any substantive offense.

In the recent case of *United States* v. *Falcone*, 311 U. S. 205, this Court held that jobbers and distributors who sold sugar, yeast and cans, with knowledge that the materials would be used in illicit distilling operations, but without knowledge that the buyers were parties to a conspiracy, were not guilty of conspiracy with the buyers to operate illicit stills, even if the sales furthered the object of the conspiracy to which the buyers were parties.

The indictment in the case at bar charges the defendants with conspiring "to defraud the United States by evading and defeating, and attempting to evade and defeat, the payment of Internal Revenue taxes duly imposed by law on distilled spirits" (R. 4-5). A sale with knowledge that the buyer intends to use the material for illegal manufacture is, under the case cited, not the equivalent of knowledge that the buyers are parties to a conspiracy to evade the payment of taxes on distilled spirits.

The holding sought to be reviewed completely fails to give effect to the controlling decision of this Court, although it was called to the attention of the Circuit Court of Appeals.

2. The holding that the Government properly introduced evidence (other than certified proof of conviction) that petitioner was guilty of an unrelated felony, for the purpose of collateral impeachment, was contrary to established federal law.

When petitioner applied to the Circuit Court of Appeals to be admitted to bail prior to the argument of the appeal to that Court, Presiding Judge Learned Hand pronounced the ruling challenged to be "clear error." Indeed, in the opinion ultimately rendered herein, Clark, Circ. J., wrote for the Court:

> "It is settled beyond question that extrinsic evidence to prove the commission of another crime is inadmissible, and that the cross examiner is bound by the witness' denial except where there is a conviction of record. *Rau* v. *United States,* 2 Cir., 260 F. 131; *People* v. *DeGarmo,* 179 N. Y. 130, 71 N. E. 736; 3 Wigmore on Evidence, 3d Ed. 1940, Secs. 987, 980."

However, the Court proceeded to distinguish this case on the grounds that petitioner had opened the door and that the Government had a right to explain papers that it had itself placed in evidence. Also, the Court, while conceding

that the imputed offense was a felony (citing *People* v. *Hines,* 284 N. Y. 93), declared that the crime was "at most but a step beyond what appellant himself advanced; for playing the numbers itself appears to be a crime—a misdemeanor."

It is submitted that these attempted distinctions find no warrant in authority or principle. The ruling was clearly contrary not only to the cases cited but to a long line of others, including *Coulston* v. *United States* (C. C. A. 10) 51 F. 178; *United States* v. *Sager* (C. C. A. 2) 49 F. 2d 725; *Beyer* v. *United States* (C. C. A. 3) 282 F. 225; *Terry* v. *United States* (C. C. A. 9) 7 F. 2d 28; *Fabacher* v. *United States* (C. C. A. 5) 20 F. 2d 736; and *Niederluecke* v. *United States* (C. C. A. 8) 21 F. 2d 511.

3. The Trial Court improperly proceeded in the presence of the jury to punish a Government witness for contempt for refusal to testify, and to permit the jury to draw an inference unfavorable to petitioner from the attendant circumstances.

It has been noted that the great weight of authority condemns the procedure of adjudging a witness in contempt—or taking other punitive action with regard to a recalcitrant witness—in the presence of the jury. *McNutt* v. *United States* (C. C. A. 8) 267 F. 670; *Rutherford* v. *United States* (C. C. A. 2) 258 F. 855; *Lile* v. *State* (Ark.) 54 S. W. 2d 293; *State* v. *Smith,* 179 La. 294, 154 So. 2; *Pinn* v. *Commonwealth* (Va.) 186 S. E. 169; *Benton* v. *State* (Ga. App.) 199 S. E. 561; *People* v. *Van Arsdale,* 242 App. Div. 545, 266 N. Y. S. 502. It does not appear that the Supreme Court of the United States has specifically passed upon the point, and a review would appear desirable. The Circuit Court of Appeals herein briefly discussed the point but dismissed any possibility of prejudice "because there were sixteen defendants and no light was thrown on whom the witness was to testify against or what he would say." If

this distinction were sound, it would be permissible for the prosecution in any multiple-defendant case (and many important indictments answer this description) to ride roughshod over all legal safeguards and then plead as justification that the number of the defendants precluded any individual from claiming to have been prejudiced.

4. The reception in evidence of telephone company toll slips and the prepared chart summarizing the calls made to and from public telephones located in petitioner's two restaurants tended to suggest his complicity in the conspiracy and was prejudicial error.

Since the record showed calls to the homes of various other defendants, the obvious inference the prosecution sought to have the jury draw from this evidence is that petitioner was in regular telephonic communication with the alleged co-conspirators, many of whom he did not even know (R. 369). The reception of such testimony had the effect of saddling petitioner with the responsibility for all calls made through these public telephones—which were accessible to all patrons of the restaurants and, indeed, to any individuals who desired to use them—and particularly for such telephone conversations as may have taken place between various of the conspirators, although petitioner may have had no dealings with them whatsoever. Proof of this nature does not rise to the level of being even circumstantial and is altogether speculative and conjectural. Under the principles laid down in such authorities as *Robilio* v. *United States* (C. C. A. 6) 291 F. 975, *United States* v. *Frankel* (C. C. A. 2) 65 F. 2d 285, *Rowan* v. *State* (Md.) 3 Atl. 2d 753, and *People* v. *Rubin*, 286 N. Y. 56 (unofficial advance sheets of August 19th, 1941), it appears plainly inadmissible.

5. Prejudicial declarations of alleged co-conspirators made after the termination of a conspiracy are inadmissible.

That this is the law is undisputed. *Seeman* v. *United States* (C. C. A. 5) 90 F. 2d 88; *United States* v. *Lonardo* (C. C. A. 2) 67 F. 2d 883; *Oras* v. *United States* (C. C. A. 9) 67 F. 2d 463. Herein the Circuit Court of Appeals sought to justify the inapplicability of the rule by saying, "The very evidence he sought to exclude, if believed, showed that he still remained in the conspiracy." If other evidence shows the conspiracy to have ended, the contents of the questionable declaration may not logically be invoked simultaneously to show the reverse and to justify the reception in evidence.

6. Reasonable doubt may not be explained to a jury by inconsequential illustrations drawn from everyday affairs.

This Court has approved the instruction that the jury must be convinced to that degree of certainty upon which one acts in the weighty and important matters of life. *Hopt* v. *Utah,* 120 U. S. 430. But, in the language of Wilbur, Circ. J., in *Paddock* v. *United States* (C. C. A. 9) 79 F. 2d 872, "No court, so far as our examination shows, has attempted to state to a jury just what matters are of sufficient importance to be used in comparison with the decision of guilt in a criminal case which deprives an individual of his life or liberty. * * * To tell the jury in effect that reasonable doubt has no more significance in deciding a criminal case than the doubt by a juror as to whether the price offered to him for a piece of property is as much as he can expect to get for it, is in our mind to entirely eliminate the doctrine of reasonable doubt from the consideration of the jury."

In the present case the Circuit Court of Appeals characterized the trial Court's language as comprising "homely examples," and was constrained to admit, "Doubtless a

judge is better advised not to use trivial examples in such a serious context." The illustration relating to buying goods against a possible price increase was termed "most doubtful," "an ill-chosen illustration" and a "somewhat cloudy allusion." Notwithstanding, the context of the charge was deemed sufficient to eradicate any likelihood of prejudice. No useful purpose can be served at this point by an extended analysis of the charge (R. 475-504), but it may confidently be asserted that nothing stated by the trial Court materially qualified or detracted from the vice of the language criticized. Coming as it did in response to a specific inquiry by the jury near the very end of its deliberations and less than twenty minutes prior to the verdict, it may not be lightly dismissed as inconsequential.

Thus the Circuit Court of Appeals for the Second Circuit adopts a rule squarely at variance with that announced by the Ninth Circuit. An explanation of reasonable doubt is an element that enters into every criminal trial, and the law on the subject should be authoritatively determined.

7. The holding that the jury be required to continue its deliberations indefinitely after it had announced its inability to agree was improper.

Where a jury has determined the cause as to fifteen of sixteen defendants and reports in writing that it is split on the remaining defendant "after long and careful discussion," any attempt on the part of the trial Court to coerce a verdict should not be sanctioned. The jury had acted with care and discrimination in differentiating between those who were guilty and those who were innocent. It had returned repeatedly for new instructions and for reading of divers portions of the testimony. Particularly noteworthy is the request for a second explanation of reasonable doubt and the weight to be accorded to circumstantial evidence. Everything about the deliberations is indicative of the continued existence of a reasonable doubt, which ultimately yielded before the pressure applied by the trial Court. *Wissel* v. *United States* (C. C. A. 2) 22 F. 2d 468.

8. The cumulative effect of all of the foregoing errors and rulings was such as to deprive petitioner of a fair trial.

We feel that the errors argued above are important ones. They have sufficed in other cases to constitute grounds for reversal. Their substantial character would entitle them to favorable action in any case. Any one of them is, as matter of law, adequate ground for invalidating a judgment of conviction. When, as here, the evidence against petitioner is so slight and inconclusive, and where a jury has such patent difficulty in reaching a verdict, any one of the errors complained of may conceivably have become the decisive factor. As in *Parlton* v. *United States* (Ct. of Ap. D. C.) 75 F. 2d 772, "In this condition of the proof some inconsequential detail, unimportant in itself, might very well turn the scales. It was, therefore, the duty of the trial judge to be watchful to see that no extraneous or improper evidence got before the jury lest it might influence their minds and prejudice the legal rights of the accused, and as there was a failure in this regard, we are obliged to declare it error." Certainly, when all of the errors adduced are found in one case, their cumulative effect to entitle petitioner to a reversal must be virtually beyond the need for argument.

CONCLUSION

For the reasons stated in the petition and in this brief it is respectfully submitted that the application for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.